Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, ...

No. 78-1113

EDWARD ROSAS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MARY EMERY, ESQ.
JOHN MARSHALL COLLINS, ESQ.
Attorneys at Law
2 North Second Street, Suite 1175
San Jose, California 95113
(408) 287-3518

Attorneys for Petitioner.

SPARTAN PRINTING COMPANY, SAN JOSE, CA 95110, (408) 293-3183

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EDWARD ROSAS, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), and the Fourth and Fourteenth Amendments to the United States Constitution.

Petitioner's Petition for Hearing to the California Supreme Court was denied without opinion on October 18, 1978. Petitioner was originally sentenced on No-

vember 3, 1977, filed a Notice of Appeal on November 17, 1977, and has been in the process of pursuing his state remedies until final denial of a hearing on October 18, 1978.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United State Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

as applied to the states by the Fourteenth Amendment (Section 1) to the United States Constituion:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

1. Can evidence resulting from an "administrative search" of a body shop constitutionally be admitted

when the search is purportedly conducted under the authority of the California Vehicle Code §2805, which provided:

> "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."[1]

2. If "administrative searches" under California Vehicle Code §2805 are generally constitutional, can said evidence be constitutionally admitted when the search was not a routine inspection, but rather a search for a specific stolen car which an untested informant said was in the shop being dismantled?

---

[1] Effective January 1, 1978 (after appellant's conviction) Section 2805 was amended to read:

> "(a) For the purpose of locating stolen vehicles, a member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment and may inspect the title or registration of vehicles in order to establish the rightful ownership or possession of the vehicle.
>
> (b) A member of the California Highway Patrol may also inspect, for the purposes specified in subdivision (a), implements of husbandry, special construction equipment, and special mobile equipment in the places described in subdivision (a) or when such a vehicle is incidentally operated or transported upon a highway.
>
> (c) Whenever possible, inspections conducted pursuant to subdivision (a) or (b) shall be conducted at a time and in a manner so as to minimize any interference with, or delay of, business operations."

STATEMENT OF THE CASE

An untested informant told San Jose Police Officers that a particular stolen vehicle was in the Mac Perez Body Shop. Upon verifying only that the vehicle had actually been stolen, a number of officers surrounded and entered the body shop. They entered by opening a large wooden sliding door into the repair area. They had no permission to enter and no search warrant.

The State justified this intrusion on the ground that it was an administrative inspection under California Vehicle Code §2805. However, the officers indicated this was not a routine inspection, was not on their agenda for that day, and was in response to the report of a specific crime.

Once inside the body shop, the officers searched the entire shop and seized auto parts, automobiles, tools, documents, and other matters. The original search was conducted before arresting Mr. Rosas and others.

Mr. Rosas moved to suppress all evidence discovered by this search. The Superior Court (County of Santa Clara, State of California) suppressed some evidence on the ground that the search went beyond the scope of §2805. However, the Court did not suppress the basic evidence—the stolen vehicle and some parts thereof. Rosas pled guilty to violation of Penal Code §496 (receiving stolen property). Under the provisions of California Penal Code §1538.5, his right to appeal the determination of his motion to suppress was preserved.

Rosas appealed and California's Court of Appeal, First Appellate District, Division Four, affirmed the lower court on August 24, 1978. Its unpublished

opinion is attached hereto. Rosas' Petition for Hearing to the California Supreme Court was denied without opinion on October 18, 1978.

Petitioner raised these issues in a proper, timely fashion. They were first raised by a motion to exclude evidence at the Preliminary Hearing on March 1, 1977. Following this, a motion to suppress under Penal Code §1538.5 was filed and heard on April 18, 1977. Both motions raised the issues presented herein.

The Honorable Peter Anello's ruling of April 25, 1978 on Petitioner's Motion to Suppress is quoted here in full to satisfy Supreme Court Rule 23(f):

> "California Vehicle Code, Section 2805, is constitutional, (*People v. Grey*, 23 CA 3d 456 (1962)). The description 'any member of the California Highway Patrol' contained therein has been interpreted by the Appellate Courts to include all peace officers. (*People v. Brown*, 4 CA 3d 382, 387 (1970); *People v. Hunter* (1969) 1 CA 3d 461, 464. Therefore, the entry by San Jose Police Officers on January 6, 1977, of the licensed body shop located at 6 San Jose Avenue was legal and not in violation of any constitutional restraints.
>
> The observation and seizure of the following automobile parts located in the garage and yard area of the premises was proper:
>
> 1. Engine with No. L28061330 stamped into block and accompanying transmission (garage);
> 2. Front end of a brown Datsun 280Z with VIN number GHLS 39934062 (garage);
> 3. Left rear quarter panel of a brown Datsun 280Z with the rear axle and drive shaft attached (garage);
> 4. Seats, spare tire, right rear fender quarter panel, and trunk deck lid (yard);

5. Left door roof, left rear piece with muffler and gas tank (yard);

Certain activities of the officers exceeded the scope of Vehicle Code 2805 and the motion to suppress as to the following items is granted:

6. All items found in the large tool chest, including: Mail addressed to Edward Rosas, barrels to a double barrel shotgun, and marijuana;
7. Mikuku .38 caliber revolver with leather holster, Serial No. 27914;
8. Two acetylene tanks on carrier bracket with gauges and hoses;
9. Tools from cardboard barrel;
10. All documents seized from the locked interior office located within the premises;
11. VIN plate from Datsun 280Z bearing numbers GHLS 30034062 and L28061330 (floor of garage);
12. Two license plates bearing the number 781 PGV and other small parts of the Datsun 280Z (cardboard barrel in garage).

The motion to suppress statements of defendants, witnesses, or other parties related to the aforedescribed automobile parts, Items 1 through 5, inclusive, is denied.

The motion to suppress statements of defendants, witnesses, or other parties related to the items seized from the tool chest, the revolver, tools, the documents, seized from the interior office, the VIN plate and the license plates, Items 6 through 12, inclusive, is granted.

DATED: April 25, 1977.

/s/ Peter Anello

JUDGE OF THE SUPERIOR COURT"

Clerk's Transcript for an Appeal from the Judgment of the Superior Court of California, in and for the County of Santa Clara, Pages 173 through 175.

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case to resolve an anomaly in the developing area of administrative search law, and to bring the California case law into accord with the Court's opinions—particularly the opinions in *Marshall v. Barlows, Inc.*, 436 US 307 (1978); *Colonnade Catering Corp. v. United States*, 397 US 72 (1970); and *United States v. Biswell*, 406 US 311 (1972).

A. California Vehicle Code §2805 is Unconstitutional.

Petitioner contends that California Vehicle Code §2805 is unconstitutional, and that the "inspection" (search) conducted by the officers under its authority must be deemed illegal and the fruits thereof suppressed. Section 2805 states:

> "A member of the California Highway Patrol may inspect any vehicle of the type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."[3]

[3] Under QUESTIONS PRESENTED FOR REVIEW the amendment to Section 2805 is set forth in full. It did not become effective until January 1, 1978, long after the "administrative search" here challenged.

Petitioner contends that this Section is unconstitutional in that it does not meet the balancing tests set forth by the United States Supreme Court and because it is not properly limited in time, place, and manner.

Since *Camara v. Municipal Court*, 387 US 523 (1967), and *See v. City of Seattle*, 387 US 541 (1967) it has been clear that administrative inspections or searches are subject to the Fourth Amendment. As noted by the California Supreme Court in *People v. Hyde*, 12 Cal. 3d 158. ; 66 (1974):

> "Like all searches subject to the Fourth Amendment, an administrative screening must be measured against the constitutional mandate of reasonableness. In the case of administrative searches, however, 'there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.' (*Camara v. Municipal Court* 1967 *supra* 387 US 523, 536-537)"

The *Hyde* case follows controlling U.S. Supreme Court doctrine. In a series of cases, this Court has set down standards for administrative searches. California Vehicle Code §2805 does not meet these standards.

In strictly regulated industries, such as the firearms and liquor industries, the Supreme Court has recently held in *Biswell, supra*, and *Colonnade Catering, supra*, that the warrant required in *Camara* and *See* is not always necessary. However, in these two decisions the United States Supreme Court set forth other applicable factors which safeguard privacy interests. In *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (1976), the Court summarized these factors as follows:

> "First the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspection will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest. Third, the inspection must be conducted with a statutorily authorized procedure, itself carefully limited as to time, place, and scope. The presence of this factor guards against the possibility that any inspection right will be abused."

In Dunlop, the defendant was a business enterprise subject to the Occupational Safety and Health Act of 1970 (29 USC §521 et. seq.) and the Secretary of Labor sought a warrantless inspection. The District Court found its interpretation of the *Colonnade* and *Biswell* cases to be applicable in light of more recent United States Supreme Court cases continuing the Court's adherence to the *Camara/See* doctrine. (See *Almeida/Sanchez v. United States*, 413 US 266 (1973) and *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 US 861, 864 (1974)). The Court concluded that *Colonnade* and *Biswell* created an exception to the general *Camara/See* rule only when these protective factors were present.

Biswell and *Colonnade Catering* represent a limited exception to the *Camara/See* rule in cases where narrowly limited administrative searches are so necessary to public welfare that the need outweighs a limited intrusion. Both involved industries of substantial public danger. Firearms are the basic tools of violence and crime. Liquor is not only a major source of governmental revenue, but is dangerous to health and welfare

if adulterated, improperly prepared, or distributed to improper persons. The substantial governmental interest in preventing these dangers outweighs the limited intrusion to insure compliance with pervasive regulations.

Marshall v. Barlows, Inc., 436 US 307 (1978), characterizes these exceptions to the warrant requirement as responses to "relatively unique circumstances":

> "These are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy [citations] could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations." 436 US at 313.

The automobile wrecking or repairing industry does not present such unique circumstances and therefore the administrative inspection allowed by California Vehicle Code §2805 does not come within these exceptions. In the present case, the auto repair and wrecking industry certainly is not "pervasively regulated" in the sense that the weapon or liquor industries considered in *Biswell* and *Colonnade* are. Nor is the industry one of great public danger. Furthermore, California Vehicle Code §2805 is not part of a pervasive regulatory scheme, but is rather enacted specifically to aid in apprehending one type of criminal.

This Court has carefully limited the exceptions to the *Camara/See* rule requiring warrants, stating:

> "The element which distinguishes these enterprises from ordinary businesses is a long tradition of government supervision, of which any person who chooses to enter such a business must already be aware. 'A central difference between those cases [Colonnade and Biswell] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessmen in a regulated industry in effect consents to the restrictions placed upon him.' *Almeida Sanchez v. United States*, 413 US 266, 271 (1973)."

Petitioner is clearly involved in an "ordinary business," rather than one with a long history of regulation. To bring the California decisional law into line with that announced in *Marshall* and its predecessors, this Court should grant Certiorari and review this case.

Furthermore, the third requirement derived by *Dunlop* from *Biswell* and *Colonnade*—that the inspection be conducted in accordance with a statutorily authorized procedure carefully limited as to time, place, and scope—clearly has not been met.[8] Where the legislature has authorized inspection but made no rules

[8]Petitioner contended below that the California law of inspection warrants (California Code of Civil Procedure §§1822.50 et. seq.) should be construed as applicable to Vehicle Code §2805 in order to make the statute constitutional. Since there was no inspection warrant issued, this construction would have vitiated the search without invalidating the statute. However, the Court of Appeals rejected this theory, holding the inspection warrant sections inapplicable. Therefore, the discretion to search was, at the time of this incident, unlimited and not subject to even the minimal regulation of submission of an inspection warrant to a magistrate.

governing the procedures that the inspection must follow, the Fourth Amendment and its various restrictive rules including the requirement of search warrants issued on probable cause apply. *Colonnade Catering v. United State, supra*, 397 US 72, 77. The instant search, lacking any warrant, does not satisfy these standards.

The time, place, and manner limitations required by *Biswell, Colonnade Catering*, and the following cases cannot be found in the general reasonableness requirements of the Fourth Amendment. In interpreting *Biswell* and *Colonnade Catering, Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (1976), clearly pointed out that, "The inspection must be conducted within a *statutorily authorized procedure*, itself carefully limited as to time, place, and scope." [Emphasis Added] This requirement at least substitutes the judgment of the Legislature for the judgment of the neutral, detached magistrate normally required by the Fourth Amendment, if searches without warrants are to take place. This is carried one step further, and one step too far, if it is suggested that in place of the Legislature's determination officers engaged in the competitive enterprise of ferretting out crime can utilize such judgment and regulate the time, place, scope, and manner of the search.

Thus it can be seen that this decision conflicts with the controlling decisions of this Court in an important, developing area of decision. Petitioner submits that this Petition should be granted and the matter heard and decided.

B. Using California Vehicle Code §2805 as the Basis for a Warrantless Search in Investigating a Specific Crime is Unconstitutional.

"... [T]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 US 1, 19 (1968). Thus if California Vehicle Code §2805 is justified as allowing "administrative" searches because of its part in general regulation of auto body and wrecking shops, it must be limited to "administrative" uses. To pervert such a provision into a substitute for a warrant in a criminal investigation goes beyond the logic of cases allowing "administrative" searches and intrudes on Fourth Amendment guarantees.

This is not a case involving a routine inspection which happens to discover evidence of crime. On the contrary, the officers had information and used §2805 in place of a warrant in a criminal investigation. *United States v. Anile*, 352 F. Supp. 14 (1973) considered similar circumstances. In that case, the inspection had been prompted by complaints about the defendant's activities, which apparently raised serious questions in the authorities' minds. These were the sole reasons for the initial visit to defendant's business and the inspection of his records. Clearly, this was not a routine inspection, but one done in furtherance of a criminal investigation. The court held that a warrant was required in such instances, stating:

> "The court recognizes that on many occasions it can be successfully argued that suspicion does not convert an administrative investigation into a

traditional criminal investigation. The problem is, of course, one of degree. The prime consideration must be the protection of recognized basic individual rights, and these individual rights should not be affected by mere labels, particularly where the substance of the matter under investigation is not consistent with the label that it attached to is.

It is further noted that search warrants for administrative inspections may be obtained under the present comprehensive Drug Abuse Prevention and Control Act of 1970 without establishing probable cause standard required in criminal cases. [citations] Perfunctory as it may be under present law, the decision of an independent judicial law officer is still a necessary factor. That factor is totally missing in this case. Under the facts here, a search warrant obviously should have been obtained prior to the agents first entry upon defendant's place of business."

(See also *Abel v. United States*, 362 US 217, 226 (1960) in which the Supreme Court condemned use of administrative warrants for purposes of gathering evidence in a criminal case.)

Assuming arguendo that inspections under Vehicle Code §2805 done on a routine basis might be so minimally obtrusive as to meet constitutional standards, nevertheless it is clear that in cases of actual criminal investigation, the statute cannot constitutionally be used to replace the traditional probable cause/warrant standard.

In construing this Court's decisions to allow predeparture screening searches of passengers boarding at airports, the California Supreme Court noted, as one justification for the scheme, the fact that the " . . .

essential purpose . . . is not to ferret out contraband or to preserve for trial evidence of criminal activity." *People v. Hyde, supra*, 12 C. 3d 158, 169-170 (1974). Here, the supposedly "administrative" search authority was used for exactly that purpose. Thus as applied, §2805 was unconstitutional and the evidence should be suppressed.

As more and more businesses come under government regulation, it is important for this Court to draw the line at which administrative search authority ends and the protection of the Fourth Amendment begins. This case involves that point, and therefore it is appropriate that Certiorari be granted to resolve these questions.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests this Court to grant a Writ for Certiorari, bringing this matter up for hearing and determination.

APPENDIX A

OPINION OF THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

(APPENDIX A)

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY
AUG 25 1978

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

FILED
AUG 24 1978
Court of ... Dist.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EDWARD ROSAS, et al.,
Defendants and Appellants.

1 Crim. No. 17702
(Superior Court No. 65379)

Edward Rosas appeals from an order by which he was admitted to probation after he pleaded guilty to a charge of receiving stolen property (Pen. Code, § 496). We affirm the order.

The appeal challenges the propriety of an order denying a motion by appellant to suppress certain evidence which was essential to the prosecution's case (Pen. Code, § 1538.5). The motion to suppress evidence was submitted on the preliminary hearing transcript.

An untested informant telephoned a police officer and told him that at a body shop, operated by appellant's co-defendant, would be found a stolen car which the informant identified by make, model, color and license number. The informant stated that the car had been stolen from a particular used car lot, and that it was being cut up at

the body shop, inferably for the purpose of cannibalizing body parts. By telephone the officer verified that a vehicle fitting the description given by the informant had been stolen from the used car lot. The officer then organized a party of several policemen who went to the body shop to investigate. They found the shop open for business and went in to check the identification of the cars that were in the shop. The stolen car was found almost immediately; it had been cut in several pieces. Appellant was one of the persons present at the shop when the officers entered. Arrests were made and criminal charges were filed. The police officers who entered the body and fender shop did not have a search warrant; they proceeded under the authority of Vehicle Code section 2805 which provides in pertintent part:

"A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantler's lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."

Appellant contends that Vehicle Code section 2805 is unconstitutional. That contention was considered and rejected in People v. Grey (1972) 23 Cal.App.3d 456 at 461; it need not be reexamined here. The fact that automobile wrecking or reconstruction shops are part of a closely

regulated industry which requires administrative inspection to suppress theft and fraud distinguishes Marshall v. Barlow's Inc. (1978) ___ U.S. ___ (56 L.Ed.2d 305).

Appellant contends that Vehicle Code section 2805 must be applied as being subject to the requirement that an officer making entry must provide himself with an "inspection warrant" of the type specified in Code of Civil Procedure section 1822.50. This contention has no merit. The inspection warrant procedure was created in response to Camara v. Municipal Court (1967) 387 U.S. 523 and See v. City of Seattle (1967) 387 U.S. 541 in order to regulate official entries of private premises where inspections are to be made in connection with building, fire, safety, plumbing, electrical, health, or zoning regulations. That procedure has no relation to the present situation where entry was authorized by another statute for the purpose of an administrative inspection of a shop operating in a closely regulated industry.

It is argued that the entry was unlawful because it was effected by local police officers rather than by highway patrol officers as mentioned in Vehicle Code section 2805. The contention must be rejected as contrary to applicable authority (People v. Brown (1970) 4 Cal.App.3d 382, 387).

Appellant contends that even if a routine inspection under Vehicle Code section 2805 would be lawful, where an "actual criminal investigation" has been launched, a search warrant should be obtained. But the legislative purpose in enacting

Vehicle Code section 2805 was to protect the public from theft and fraud in the operations of the specified categories of automobile service shops. It would be unreasonable to allow routine inspections under section 2805 where the officer has no indication of any impropriety, but to preclude administrative inspection where there is some reason to suspect that activities are in progress of the kind at which Vehicle Code section 2805 is aimed.

Finally, appellant contends that the evidence obtained by the officers should have been suppressed because they did not knock, identify themselves, demand admittance, and explain their purposes before entering the shop (Pen. Code, §§ 844 and 1531). The Penal Code sections relied upon by appellant have no application to the present situation where the officers did not force their way into the shop, inasmuch as the shop was operating and open to the public (People v. James (1971) 17 Cal.App.3d 463).

The probation order is affirmed.

Christian, J.

We concur:

Caldecott, P. J.

Good, J.*

* Under assignment by the Chairperson of the Judicial Council.

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GEORGE DEUKMEJIAN,
ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA

ROBERT H. PHILIBOSIAN,
CHIEF ASSISTANT ATTORNEY GENERAL—CRIMINAL DIVISION

EDWARD P. O'BRIEN
ASSISTANT ATTORNEY GENERAL

ROBERT R. GRANUCCI
DEPUTY ATTORNEY GENERAL

MARTIN S. KAYE
DEPUTY ATTORNEY GENERAL
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0203
Attorneys for Respondent.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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OPINIONS BELOW

The unpublished opinion of the California Superior Court filed April 25, 1977, granting in part and denying in part petitioner's motion to suppress evidence, is contained in the petition for certiorari at pp. 5-6.

The unpublished opinion of the California Court of Appeal filed August 24, 1978, which affirms that part of the Superior Court order denying petitioner's motion to suppress is attached as Appendix A to the petition for certiorari.

Hearing in the California Supreme Court was denied without opinion on October 18, 1978.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether an employee of an auto body shop has standing to object to a search of the open garage area of that business which is open to other employees and apparently the public?

2. Whether California Vehicle Code section 2805, which authorizes warrantless searches of auto body shops, is constitutional?

3. Whether California Vehicle Code section 2805 constitutionally justifies a warrantless search for a stolen car as well as a routine administrative inspection?

STATEMENT OF THE CASE

By information filed March 8, 1977, in Santa Clara County Superior Court, petitioner and several co-defendants were charged in Count I with violating California Vehicle Code section 10851 (auto theft) and in Count II with violating California Penal Code section 496 (receiving stolen property) (CT 1).[1] Petitioner pled not guilty the same day (CT 2).

[1]CT designates the state clerk's transcript on appeal; RT designates the state reporter's transcript on appeal. The motion to suppress evidence was submitted on the preliminary hearing transcript (RT 13) which is contained in the clerk's transcript.

On April 18 and 25, 1977, petitioner's motion to suppress evidence, allegedly obtained by an illegal search and seizure, under California Penal Code section 1538.5 was granted in part and denied in part (CT 169, 173-175).

On September 1, 1977, petitioner pled guilty to Count II and Count I was dismissed (CT 179). On November 3, 1977, petitioner was placed on probation (CT 182, 184).

The petition for certiorari was filed January 15, 1979.

STATEMENT OF FACTS

On the morning of January 6, 1977, Officer Dennis McKenzie of the San Jose Police Department auto theft detail received a phone call about an auto theft (CT 38). The stolen car was described as a bronze colored Datsun 260Z or 280Z, license number 781 PGV (CT 39). The informant stated the car was at co-defendant Mac Perez' Body Shop on San Jose Avenue (CT 39). The informant further stated the car was stolen from Downtown Datsun and that one Rezendes, a person named Ed, and two brothers were involved (CT 39-40, 73). Rezendes was said to drive a tow truck (CT 73).

The informant told Officer McKenzie that an associate of petitioner and his co-defendants had once tried to steal his car and petitioner and his co-defendants had broken his windows (CT 74). The informant gave his name and address (CT 47).

Officer McKenzie said the informant called to assist the police and had never been an informant before (CT 46). The informant had obtained the information by being present at the body shop (CT 82). He said the car was in the process of being cut up (CT 82). Officer McKenzie

called Downtown Datsun and confirmed a car fitting the stolen vehicle's description had in fact been stolen (CT 9, 11, 40).

After this confirmation, about 9:45 a.m., Officer McKenzie and five or six other San Jose police officers went to the Mac Perez Body Shop at 6 San Jose Avenue (CT 40-41, 76).

The shop was open for business (CT 40, 89) and Officer McKenzie opened the unlocked sliding garage door and entered (CT 44-45). No one had drawn guns (CT 76). Inside were petitioner and co-defendants Leonard Rezendes, Valentine Ferrell, and Mike Ferrell (CT 41-43). John Morgan was also present (CT 41). The garage measured approximately 90 feet by 40 to 50 feet (CT 87).

Officer McKenzie asked who was in charge and who was employed at the shop (CT 43). Everyone said they were employees and no one present was in charge (CT 43). Officer McKenzie declared he was going to check the premises pursuant to Vehicle Code section 2805 (CT 43, 48-49). He had no warrant of any kind (CT 44).

Checking all the cars, Officer McKenzie found the stolen Datsun in five minutes (CT 51, 84-86). It was cut up by a torch in quite a few sections (CT 51). The doors, front end, fenders, and top had been removed (CT 51). The car's engine was on a tow truck hook (CT 53). The truck had Leonard Rezendes' name on the driver's door (CT 53). The tow truck, inside the garage, also had the stolen transmission in the back (CT 54).

Another wrecked Datsun with extensive front end damage was also in the shop (CT 58). It also needed a new passenger door (CT 59). A door and the front end of the Datsun were placed right next to the corresponding parts of the other Datsun (CT 59). It is possible to replace the entire front end of these cars (CT 58-59).

Officer McKenzie entered the locked Body Shop office by using a screwdriver (CT 64). In the office he found a receipt for the non-stolen Datsun from Air Auto Salvage, a consumer affairs sticker showing the shop belonged to co-defendant Perez and was subject to Vehicle Code section 2805, and some other items, all of which were ordered suppressed (CT 61, 91). Petitioner and his co-defendants were arrested (CT 70).

John Morgan works at Collection Bureau of San Jose (CT 16). In business dealings with co-defendant Perez, Morgan would give Perez money to buy damaged cars which he would repair and they would then split the profits of a sale (CT 16, 19-21). Morgan gave Perez money to buy from Air Auto Salvage the other Datsun found at the shop (CT 17-18).

As part of his duties, Officer McKenzie routinely checks repair shops once or twice a week pursuant to Vehicle Code section 2805 (CT 83, 97).

At the police station, the Ferrells were placed in a room by themselves where a tape recorder monitored their conversation (CT 70-71). In conversation, with Valentine Ferrell doing most of the talking, it was stated only one person could place them with the Datsun, he was not going to

testify, so they would just deny being there (CT 71-72). Valentine said they should have gotten rid of the car the previous evening (CT 72).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment XIV, section 1: " . . . No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."

SUMMARY OF ARGUMENT

Petitioner has no standing to object to the search because he had no reasonable expectation of privacy in the open garage area of his employer's auto body shop. In any event, California Vehicle Code section 2805 as applied here constitutionally permits warrantless searches of auto body shops during business hours. People involved in the auto body shop business are engaged in a discrete industry which is pervasively regulated and in effect consent to warrantless searches. Moreover, the governmental interests involved, prevention of trafficking in stolen vehicles, maintaining vehicle safety, and protection of consumers, are great. A warrant requirement would frustrate government regulation here because of the automobile's mobility and the easy alteration of vehicle numbers and papers.

Finally, if California Vehicle Code section 2805 constitutionally permits routine warrantless administrative searches, it was not unconstitutionally used to search where a tip indicated specific criminal activity was afoot.

ARGUMENT

I

PETITIONER HAS NO STANDING TO OBJECT TO THE WARRANTLESS SEARCH OF THE OPEN GARAGE AREA OF HIS EMPLOYER'S AUTO BODY SHOP.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court posited two ways a defendant could show he had the necessary standing to challenge a search.

One way was where the same possession needed to establish standing was an essential element of the crime charged. In such a case, the defendant's standing was said to be "automatic," because it was deemed unfair to force him to testify to possession in order to show standing and then permit the prosecution to use that testimony to convict. *Jones v. United States, supra*, at 261-265. Both for the self-incrimination dilemma of the defendant and the vice of permitting the Government to take contradictory positions (i.e., charging possession as part of the crime and denying it for standing purposes), standing was deemed satisfied. *Jones v. United States, supra*, at 261-265; *Brown v. United States*, 411 U.S. 223, 227-229 (1973).

The other method required the defendant to show he was "legitimately on the premises where a search occurs" to establish standing. *Jones v. United States, supra*, at 267.

Petitioner here qualifies for standing to challenge the present search on both grounds. Receiving stolen property, a crime with which he was charged and pled guilty to, is a possessory crime, establishing "automatic" standing under *Jones*. The crime was alleged to have occurred on the day of the search. See, *Brown v. United States, supra,* at 228. In addition, as an apparent employee of the body shop, he was "legitimately on the premises" when it was open for business.

However, in *Rakas v. Illinois,* ..... U.S. ....., 58 L. Ed.2d 387 (1978), this Court eliminated the separate standing analysis for determining whether a defendant may raise a Fourth Amendment claim and subsumed it within substantive search and seizure law. *Id.* at ..... U.S. ....., 58 L.Ed.2d 398-399. Because Fourth Amendment rights are personal,[2] and may be invoked only by those whose own protection was infringed by the search and seizure, *Simmons v. United States,* 390 U.S. 377, 389 (1968); *Alderman v. United States,* 394 U.S. 165, 174 (1969), this Court held the proper analysis is not whether the defendant has standing, but:

> "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 399.

[2]As distinguished from the right to invoke the Exclusionary Rule. Cf. *Stone v. Powell,* 429 U.S. 465, 486 (1976).

This Court then specifically rejected the "legitimately on the premises" rational of *Jones* as "too broad a gauge for measurement of Fourth Amendment rights." [Footnote omitted]. *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed. 2d 387, 400. *Jones* was limited to its facts, *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 491, confining it to "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 400.

Instead of the separate *Jones* standing analysis, the focus is now on the scope of the defendant's substantive protection under the Fourth Amendment, which is dependent "upon whether the defendant who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois, supra,* at 401; *Katz v. United States,* 389 U.S. 347, 353 (1967).

Bearing the new rule of *Rakas* in mind, petitioner had no expectation of privacy in the body shop garage of his employer. He asserted neither a property nor a possessory interest in the garage, nor any interest in the property seized. The latter property was shown to be owned by Downtown Datsun and the former by co-defendant Mac Perez. The garage was a large open area, about 90 feet long and 40 to 50 feet wide. The sliding entrance door, though closed, was not locked. The shop was open for business. The stolen vehicle was out in the open, in full view, partially on a tow truck owned by a co-defendant. Petitioner could have no expectation of privacy in the garage

or on his co-defendant's truck. Petitioner's claim must fail as not cognizable.

The "automatic" standing rule of *Jones* is of no aid to petitioner in light of *Rakas*. The clear implication of *Rakas* is that a legitimate expectation of privacy must be shown in order to have a cognizable Fourth Amendment claim. Absent that legitimate expectation of privacy, it is of no import that the crime charged is possessory, for there is no interest the defendant has which the Fourth Amendment was designed to protect.

II

CALIFORNIA VEHICLE CODE SECTION 2805 IS CONSTITUTIONAL.

At the time of petitioner's offense, California Vehicle Code section 2805 stated:[3]

> "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantlers lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."

Petitioner contends the statute is unconstitutional because "it does not meet the balancing tests set forth by the United States Supreme Court and because it is not properly limited in time, place, and manner." Pet. at 8.

[3]The section has since been amended and the revised statute appears in the petition at p. 3, n. 1.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), this Court, overruling contrary precedent, held that statutes authorizing warrantless administrative searches for municipal fire, health and housing inspections were unconstitutional. A search warrant, albeit one that could be obtained without traditional criminal probable cause, was held to be required to conduct these kinds of searches. *Camara v. Municipal Court, supra*, at 534.

In *See v. City of Seattle, supra*, this Court carefully pointed out that it was not implying:

> "that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.* at 546.

Subsequently, in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), this Court found exceptions to the warrant requirement of *Camara* and *See*. Noting that *Camara* and *See* left undecided the reach of the Fourth Amendment with respect to various regulatory statutes, *Colonnade Catering Corp. v. United States, supra*, at 76-77; *United States v. Biswell, supra*, at 313, the Court in each case upheld statutes authorizing warrantless searches.

In *Colonnade*, the statute provided for warrantless inspection of retail liquor dealers. The Court held that be-

cause of the long history of pervasive regulation of the liquor business, warrantless searches were reasonable under the Fourth Amendment. *Colonnade Catering Corp. v. United States, supra,* at 75-76.

In *Biswell,* the statute provided for warrantless inspection of firearms and ammunition dealers. The Court held that although the regulation of interstate traffic in firearms was not as deeply rooted in history as was the case with liquor, firearms control for the purpose of preventing violent crime was a significantly large interest which would be frustrated by the requirement of a warrant. *United States v. Biswell, supra,* at 315-316. The Court further noted that warrantless inspections pose only a limited intrusion on the dealer's privacy because he knows, when he chose to enter a pervasively regulated business, that his premises and records will be open for inspection. *United States v. Biswell, supra,* at 316.

In the present case, we also deal with a pervasively regulated industry. California has an entire code devoted to vehicles, and examination of it "discloses elaborate provisions for the registration and licensing of such businesses, designed to segregate the honest business man from the thief and the fence [footnote omitted]." *People v. Grey,* 23 Cal.App.3d 456, 461 (1972). Automotive repair shops are particular subjects of close regulation, California Business and Professions Code sections 9880 et seq., and must make their records open for reasonable inspections. California Business and Professions Code section 9884.11. As noted in *People v. Grey, supra,* car dismantling businesses and related activity are "frequently utilized as a 'front' by per-

sons engaged in the very kind of illegal business herein involved." *People v. Grey, supra,* at 461.

Moreover, unsafe automobiles can be as dangerous as firearms. The state has a legitimate governmental interest in seeing that consumers receive only those repairs which are necessary and at a fair price, in preventing trafficking in stolen vehicles and their parts and also in seeing that unsafe vehicles are not placed on public thoroughfares.

It is true, as with the firearms of *Biswell* and unlike the liquor of *Colonnade,* automobile regulation is not deeply rooted in history. But like firearms, automobiles have always been pervasively regulated. Since automobiles are a creature only of the twentieth century, regulation of them is necessarily limited to that time.

Petitioner places heavy reliance on this Court's recent decision in *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978). In that case this Court held that the Occupational Safety and Health Act (OSHA) was unconstitutional to the extent that it authorized warrantless searches. *Marshall v. Barlow's, Inc., supra,* at 325. The Court held that simply because a business was engaged in interstate commerce and subject to regulation as to employee wages and hours did not make it a closely regulated industry of the kind in *Colonnade* and *Biswell. Marshall v. Barlow's, Inc., supra,* at 313-314.

> "'A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burden as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman

in a regulated industry in effect consents to the restrictions placed upon him.'" *Marshall v. Barlow's, Inc., supra,* at 313, quoting from *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973).

Marshall v. Barlow's Inc., supra, is distinguishable not only because the regulation there involved was not pervasive enough to justify constructive consent to search, but also because the regulation was not limited to one type of business such as firearms, liquor, or, as here automobiles. The regulations sought to justify consent to search were those applied to all businesses engaged in interstate commerce. *Marshall v. Barlow's Inc., supra,* at 313-314. If warrantless searches were upheld on that basis, they would be the rule rather than the exception. *Marshall v. Barlow's Inc., supra,* at 313.

Statutes limited to discrete businesses, where regulation is pervasive, would still fall under the *Colonnade-Biswell* exception. *Marshall v. Barlow's Inc., supra,* at 321.

The enforcement needs of vehicle regulation require warrantless searches. In *Marshall v. Barlow's Inc., supra,* at 315-321, this Court found that the warrant requirement would not render enforcement of OSHA regulations ineffective. But with automobiles, which occupy a special category in Fourth Amendment case law, due, *inter alia,* to their quick mobility and registration requirements, *Marshall v. Barlow's, Inc., supra,* at 315 n. 10, the need for warrantless inspection is great. The vehicle otherwise can easily be moved and registration numbers can be altered and papers forged. As noted in *South Dakota v. Opperman,* 428 U.S. 364, 367-368 n. 2 (1976):

"In *Camara v. Municipal Court* [citation omitted], and *See v. City of Seattle* [citation omitted], the court held that a warrant was required to effect an unconsented administrative entry and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes." See also, *United States v. Martinez-Fuerte,* 428 U.S. 543, 560 n. 14 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 883 n. 8 (1975); *People v. Nunn,* 264 Cal.App.2d 919, 922 (1968).

As to the lack of any statutory limits on the time, place, and scope of the search, petitioner is hardly in a position to complain. The search here took place while the shop was open for business and it is not alleged that it was not carried out in an orderly, non-disruptive manner. The statutes in *Colonnade* specified only that entry be made during the day, during business hours, or at night if the premises were then open, for the purpose of examining the records required to be kept and articles subject to tax. *Colonnade Catering Corp. v. United States, supra,* at 73 n. 1, 2. The statute in *Biswell* provided only that entry be during business hours for the purpose of examining records required to be kept and firearms and ammunition stored on the premises. *United States v. Biswell, supra,* at 312 n. 1. While the present statute does not specify that entry be made during business hours, since such entry was in fact made then, petitioner has no basis for complaint. In all other respects, there is no material difference between California Vehicle Code section 2805 and the statutes upheld in *Colonnade* and *Biswell* as to the time, place, and scope of the search.

To reiterate, this case involves a pervasively regulated subject under which people who choose to enter the business are fully aware of warrantless search provisions. The regulation covers a discrete subject, not applicable to every business. The need for warrantless inspection is great both because the automobile is easily moved and the interests at stake are large. The statute in question therefore comes within the *Colonnade-Biswell* exception to the warrant requirement.

III

IF CALIFORNIA VEHICLE CODE SECTION 2805 CONSTITUTIONALLY PERMITS ROUTINE WARRANTLESS ADMINISTRATIVE SEARCHES, IT ALSO CONSTITUTIONALLY PERMITS A SEARCH WHERE A SPECIFIC TIP INDICATES THAT CRIMINAL ACTIVITY IS AFOOT.

Petitioner contends even if California Vehicle Code section 2805 constitutionally authorizes routine warrantless administrative searches of auto body shops, the present search was unconstitutional because it was used to investigate a specific tip that criminal activity was afoot.

It seems to us absurd that searches which can be conducted on no evidence whatsoever become invalid when the police have some information in their possession that a crime may be taking place. To say that the police were searching for evidence of a crime rather than administrative compliance is of no help to petitioner, for lack of administrative compliance is invariably itself a crime. *Camara v. Municipal Court, supra,* at 531.

United States v. Anile, 352 F. Supp. 14 (N.D.W.V. 1973), relied on by petitioner, is distinguishable and unpersuasive. In *Anile* there were four warrantless searches over the course of two and one-half months, hardly the situation here.

In addition, as noted in *People v. Curco Drugs,* 76 Misc. 2d 222, 350 N.Y.S.2d 74, 84 (1973), which refused to follow *Anile,* the petitioner knew in advance that his premises were liable to warrantless searches and it "would be a meaningless formality" to require a warrant to search premises which by statute the police may search anyhow.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Dated, April 10, 1979.

GEORGE DEUKMEJIAN,
ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA

ROBERT H. PHILIBOSIAN,
CHIEF ASSISTANT ATTORNEY GENERAL—CRIMINAL DIVISION

EDWARD P. O'BRIEN
ASSISTANT ATTORNEY GENERAL

ROBERT R. GRANUCCI
DEPUTY ATTORNEY GENERAL

MARTIN S. KAYE
DEPUTY ATTORNEY GENERAL
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0203
Attorneys for Respondent.